

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35081 (SUB-NO. 1)

**CANADIAN PACIFIC RAILWAY COMPANY, ET AL.
- CONTROL -
DAKOTA, MINNESOTA & EASTERN RAILROAD CORP., ET AL.**

MOTION TO STRIKE REPLY TO REPLY

The Board's rules clearly state that "[a] reply to a reply is not permitted." 49 C.F.R. § 1104.13(c). Nevertheless, United Transportation Union Local 911 ("Local 911") chose to submit a Reply to the Reply that Canadian Pacific Railway Company ("CP") and its U.S. carrier subsidiaries Soo Line Railroad Company ("SOO") and Dakota, Minnesota and Eastern Railroad Corporation ("DM&E") filed in response to Local 911's "Petition for Enforcement." Local 911 did not seek leave to file its unauthorized reply and did not suggest any reason why the Board should consider it. Accordingly, CP, DM&E, and SOO (collectively, "Movants") move to strike Local 911's Reply to Reply.

The Board's rule prohibiting replies to replies is based on a sound policy of promoting "quicker Board action." *Beaufort R.R. Co., Inc.—Modified Rail Certificate*, STB Fin. Docket No. 34943, at 5 (July 21, 2009). As the Board explained in *Beaufort*, § 1104.13(c) embodies a decision to give all parties fair and equal opportunities to present arguments to the Board: "[a] person requesting Board action must include in the opening pleading all arguments supporting the requested action. Likewise, any responding party is required to place all arguments in its only pleading: a reply." *Id.* Further pleadings are not permitted without a showing of good cause for waiving § 1104.13(c). The Board regularly enforces this rule and rejects parties'

attempts to supplement their initial filings with additional pleadings. *See, e.g., Dairyland Power Cooperative v. Union Pac. R.R. Co.*, STB Docket No. 42105, at 4 n.5 (July 29, 2008); *Union Pac. Corp. et al.—Control and Merger—Southern Pac. Rail Corp.*, STB Fin. Docket No. 32760 (Sub-No. 44), at 3 (July 27, 2005); *WTL Rail Corp.—Pet. for Declaratory Order*, STB Docket No. 42092, at 2 (June 22, 2005). Here, too, the Board should adhere to its rules and strike Local 911's improper pleading.

In addition, Local 911's Reply to Reply contains several serious misrepresentations of fact that should be corrected. Most prominently, Local 911 contends – for the first time – that the Twin Cities Trackage Rights Agreement pursuant to which DM&E operates over SOO's line between La Crescent and St. Paul, MN does not, in fact, grant DM&E the right to run *any* trains between La Crescent and St. Paul. Local 911 bases this bizarre claim on language drawn from Section 1.3(a) of the Twin Cities Trackage Rights Agreement. *See* Reply to Reply at 3 (citing Reply Ex. 1 at Section 1.3(a) and claiming that this subsection represented “the only information” regarding the scope of the rights granted under the agreement).

Contrary to Local 911's assertion, Section 1.1 of the Twin Cities Trackage Rights Agreement expressly defines the “Subject Trackage” over which DM&E holds trackage rights to include SOO's line extending from MP 159.0 at La Crescent, Minnesota through MP 416.3 at Merriam Park, Minnesota. *See* Reply of CPR, SOO, and DM&E Ex. 1 at ¶ 1.1 (filed Nov. 19, 2010); *id.* at Ex. A (map of Subject Trackage). The language in Section 1.3(a) upon which Local 911 relies does not define the geographic scope of DM&E's trackage rights. Rather, Section 1.3 contains a limitation on the right that SOO granted to DM&E's predecessor-in-interest, I&M Rail Link (“IMRL”), to handle certain “Overhead Traffic” over the Subject Trackage. Moreover, the language cited by Local 911 expressly excluded from the definition of

prohibited "Overhead Traffic" any traffic moving to or from points on the former IMRL's lines and traffic moving to or from "points both south and west of the intersection of the latitude of Cornus, Minnesota and the longitude of Davenport, Iowa." *Id.* at ¶ 1.3(a). The DM&E trains about which Local 911 complains operate between St. Paul and Kansas City, and exclusively handle traffic that is either (i) moving to or from points on the former IMRL's lines or (ii) moving to or from the Kansas City gateway (which is both south of Cornus and west of Davenport). The DM&E trackage rights trains in question therefore fall squarely within the exception to prohibited "Overhead Traffic" upon which Local 911 mistakenly relies. In short, the language that Local 911 cites (and misinterprets) provides no support whatsoever for its claim that DM&E has no contractual right to operate trains between La Crescent and St. Paul.¹ Moreover, even if Local 911 had raised a colorable claim that DM&E was somehow violating a provision of the Twin Cities Trackage Rights Agreement, as a non-party to the agreement Local 911 would have no standing to assert any such claim.²

Finally, it should be noted that Local 911's Reply to Reply is completely nonresponsive to the arguments in Movants' Reply. Local 911 does not dispute that it lacks legal capacity to negotiate an implementing agreement, but, instead, falsely claims that it was never seeking such an agreement. *Compare* Reply to Reply at 2 ("UTU Local 911 is not seeking an implementing

¹ Local 911's similar assertion that it "see[s] no . . . exhibits o[r] documentation . . . that specifically points out, up to six trains per day" (Reply to Reply at 3) shows that Local 911 simply disregards all the evidence of record. DM&E's authority to run as many as six trackage rights trains per day is clearly set forth in Section 2.14 of the Twin Cities Trackage Rights Agreement – indeed, that language is quoted in the first paragraph of the factual background section of Movants' Reply. *See* Reply at 3; Twin Cities Trackage Rights Agreement (Reply Ex. 1) at ¶ 2.14 ("I&M's use of the Subject Trackage . . . shall not exceed on a regular basis six (6) trains per calendar day.").

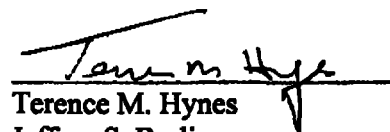
² The Board itself disclaims jurisdiction to adjudicate questions of contract interpretation – even where they are raised by a party to the contract. *See, e.g., Lackawanna County R.R. Auth.—Acquisition Exemption—F&L Realty, Inc.*, STB Fin. Docket No. 33905, at 6 (Oct. 22, 2001) ("it is not our place to interpret the contracts that appear to be at the heart of this dispute.").

agreement with CPR”) with Local 911 Pet. at 9-10 (demanding that “an order of enforcement should be issued requiring CPR to enter into Good Faith negotiations with UTU Local 911 for an Implementing Agreement”). Nor does Local 911 present any facts or argument to dispute Movants’ showing that the claim Local 911 raises would have to be addressed in the first instance in arbitration (by a proper party, which Local 911 is not) under the employee protective conditions imposed in the September 30, 2008 *CP/DM&E Control Decision* in Docket No. 35081. Nor does Local 911 respond to the detailed evidence in the Reply establishing that DM&E has not exceeded its trackage rights and that no SOO employees have been adversely affected by DM&E’s exercise of its trackage rights. Therefore, even if the Board were to entertain Local 911’s Reply to Reply (and it should not), this improper pleading does not provide any reason why the Board should grant Local 911’s Petition for Enforcement.

CONCLUSION

For the foregoing reasons, Local 911’s Reply to Reply should be struck from the record of this proceeding.

Respectfully submitted,



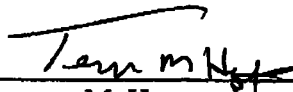
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Dated: December 21, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Motion of Canadian Pacific Railway Company, et al., to be served by first class mail, postage prepaid, this 21st day of December 2010 to all parties of record.


Terence M. Hynes